

SEMINOLE COUNTY GOVERNMENT AGENDA MEMORANDUM

SUBJECT: Southland Construction, Inc. v. State of Florida Department of Transportation v. Seminole County and Progress Energy

DEPARTMENT: County Attorney's Office

DIVISION: Litigation

AUTHORIZED BY: Lola Pfeil

CONTACT: Sharon Sharrer

EXT: 7257

MOTION/RECOMMENDATION:

This litigation arose from a road widening and reconstruction project on State Road 434 from McCulloch Road to Mitchell Hammock Road. Southland Construction, Inc. was the general contractor on the job. Seminole's involvement arose from its Joint Project Agreement for Utility Work with FDOT. Acceptance of the proposed mediated settlement approves Seminole County's payment of \$135,000.00 as its fractional share of a total settlement of \$350,000.00 to settle the breach of contract action that Southland Construction, Inc., filed against the State of Florida Department of Transportation. The FDOT, in turn, had filed third-party claims against Seminole County and Progress Energy, alleging that Seminole and Progress had breached their contractual agreement to "defend and indemnify" FDOT as to portions of Southland's claims that related to their respective utility portions of the work. Judge Lauten.

District 1 Bob Dallari

Robert A. McMillan

BACKGROUND:

see attached

STAFF RECOMMENDATION:

Staff recommends that the Board accept the proposed mediated settlement approving Seminole County's payment of \$135,000.00 as its fractional share of a total settlement of \$350,000.00 to settle the breach of contract action that Southland Construction, Inc., filed against the State of Florida Department of Transportation.

ATTACHMENTS:

1. Southland Construction, Inc.

Additionally Reviewed By: No additional reviews



**COUNTY ATTORNEY'S OFFICE
MEMORANDUM**

TO: Board of County Commissioners

THROUGH: Robert A. McMillan, County Attorney

FROM: Matthew G. Minter, Deputy County Attorney

CONCUR: Joseph Forte, Acting Director / Environmental Services

DATE: April 3, 2009

Subject: Breach of Contract Action
Southland Construction, Inc. v. State of Florida Department of
Transportation v. Seminole County and Progress Energy
Case No. 07-CA-5560 (Ninth Judicial Circuit)

This memorandum requests that the Seminole County Board of County Commissioners ("BCC") accept the proposed mediated settlement wherein Seminole County pays \$135,000.00 to the State of Florida Department of Transportation ("FDOT") to settle the third party action FDOT filed against Seminole County and Progress Energy for breach of contractual duty to defend and indemnify FDOT for suits containing allegations related to utility work in the main contract between FDOT and Southland Construction, Inc. ("Southland"), regarding a project for construction for SR 434 improvements in Orange and Seminole Counties. The \$135,000.00 payment is Seminole's portion of a global settlement in the amount of \$350,000.00 which will be paid to Southland. After payment of the \$135,000.00 FDOT will release Seminole County's escrowed funds from the project.

I BACKGROUND

This lawsuit of Southland Construction, Inc. involves a road widening and reconstruction project for an approximate 4-mile segment of SR 434 in both Orange and Seminole Counties between McCulloch Road and Mitchell Hammock Road. The project involved not only the road widening, but also replacement of existing stormwater, water, wastewater, reuse, power and phone utility lines and construction of new lines. There were three Joint Project Agreements ("JPA") involving utilities (Seminole County Utilities, Alafaya Utilities and City of Oviedo Utilities), plus Progress Energy and AT&T. The project was very complicated, and involved the coordination of work that involved, for example, the construction of new stormwater lines that would, at the end of the project, occupy the space of existing water mains or re-use mains. But, the existing mains could not be taken out of service until the new water main or re-use main was

placed in service. So, in very general terms, the project involved multiple facilities, the construction or relocation of which was interdependent with the construction or relocation of one or more other utilities. On multiple occasions where a problem arose with the plans or constructability or site conditions involving a single utility component, and the contractor adjusted its schedule to accommodate that problem, that adjustment then had a "ripple effect" causing changes to multiple other scheduled portions of the work. In this lawsuit, Southland Construction alleged that by the end of the Project, it had incurred literally "hundreds" of schedule changes and movement of its construction forces in response to these types of problems, so that it was unable to construct the project in accordance with a coherent construction schedule. Even though during the course of the job, Southland had been granted 162 change orders, its suit claimed that there were two major change orders, seeking both additional time and compensation that were not approved. Those related specifically to problems with underground utilities, and with extra "cut and patches" or temporary pavement work, over and above what they felt was called out in the contract documents. For example, the FDOT traffic control plans (TCP) showed 44 cut and patches, but Southland ultimately had to perform in excess of 125 cut and patches. FDOT's Design Manual indicated that all such temporary pavement should be shown on the TCP, but in the case of Seminole County, none of its cut and patches were shown on the TCP, and no pay item was included for that work. Seminole County *had shown* the corresponding utility line road crossings on *its utility plans* submitted to FDOT, but there was a dispute over whose responsibility it was to ensure that the temporary pavement related to those crossings, was shown in the TCP. That was just one of multiple items of claims. Part of Southland's suit involved direct costs for which it claimed it was never compensated, but the larger portion of its suit was a claim referred to in the construction industry as a "disruption" or "inefficiency" or "cumulative impact" claim. The conceptual basis of this type of claim is that, even if the Project owner (here, FDOT) approves payment for individual change orders, at some point when there are multiple project disruptions, involving the contractor having to move its forces from one portion of the job to another (as opposed to, for example, having them work one segment of the job in a continuous twenty-day period), and then moving them back again, there are significant additional costs that the contractor incurs as a result of those inefficiencies for which it is entitled to compensation. As previously indicated, in this project, the contractor encountered literally hundreds of these type situations.

As part of the JPA Seminole signed with FDOT, Seminole County agreed to "defend and indemnify" FDOT for any claims related to defects in Seminole County's plans or work. Legally, the obligation to "defend" is separate and distinct from an obligation to "indemnify," even though they are related. Late in 2007, after FDOT had received Southland's original complaint, FDOT contacted Seminole County and it was basically understood that FDOT offered to settle the entire case by taking approximately \$350,000.00 of interest earned on Seminole County's escrow funds for this Project or Seminole County could agree with FDOT that Seminole was "obligated" to defend FDOT. We declined FDOT's offer. Last year, FDOT filed a third-party lawsuit against Seminole County and Progress Energy, alleging that Seminole County and Progress Energy were in breach of their respective obligations to defend and indemnify FDOT.

The City of Oviedo and AT&T did agree to "defend" FDOT and they funded the hiring of outside counsel to defend the suit.

FDOT subsequently filed a motion for partial summary judgment against both Seminole County and Progress Energy asking the judge to rule as a matter of law that both Seminole County and Progress Energy were obligated to mount a defense for FDOT. Seminole County defended this suit with our County Attorney staff. The trial court ruled in Seminole County's favor on that motion and denied FDOT's motion.

The case was set for trial next year. The multiple parties were in agreement that the costs to litigate this action over the next year would be very expensive, possibly exceeding the value of the claim itself, after considering multiple outside counsel and multiple expert witnesses. For example, in the course of this litigation since Seminole County's first involvement, FDOT has had 4 in-house attorneys and two outside attorneys (representing FDOT, AT&T and Oviedo), plus multiple expert witnesses; Progress Energy has had outside counsel plus experts; the plaintiff has two attorneys plus expert witnesses. The defense of the claims asserted in this case would involve expert witnesses disputing over hundreds of specific project changes, and the financial effect of each. One of the specific problems with the nature of this claim was the problem of incurring expert fees both to defend the "global" claim of Southland against FDOT (and implicitly, the utilities), and then paying the experts again to fight over the proper "apportionment" among FDOT and the multiple utilities of their "share" of any damages paid to Southland. Seminole County elected to defend this case in-house, and pursue a rational and reasonable resolution of the case, before incurring significant outside expenses. The trial of this action could easily take two full weeks. Therefore, counsel for the parties agreed that it was in everyone's best interests to attempt an early mediation, before incurring additional significant costs.

The case was mediated over ten hours on March 30, 2009, in Orlando. Southland was initially seeking damages of \$2.8 million, plus interest, costs and fees. At the end of the mediation, the case was settled for a global settlement of \$350,000.00, with each party bearing its own fees and costs. The breakdown of the settlement is as follows:

\$135,000.00	Seminole County
\$ 75,000.00	Progress Energy
\$ 50,000.00	AT&T/BellSouth
\$ 69,000.00	FDOT; and
\$ 21,000.00	City of Oviedo

II COST AVOIDANCE

Even though Seminole's "share" of this settlement is the largest share, this amount is significantly less than the amount it could have settled for a year ago, and Seminole County was the only party that did not incur any outside attorney fees or expert fees for its defense. A side benefit of the settlement is that it will result in the

release back to Seminole County of the remaining balance of escrow funds, along with interest thereon, that has been on deposit with FDOT since the beginning of this job. Had the case not settled, Seminole County would have had to incur the expense of one or more outside experts, and the prospect was that, even with a "best case" verdict in the end, Seminole County may well have spent more than that in "hard dollar" defense costs, plus the loss of hundreds of hours of staff time in defending the various claims.

III RECOMMENDATION

It is recommended that the Board of County Commissioners approve the proposed mediated settlement. A copy of the Settlement Agreement is attached hereto.

MGM/dre

P:\Users\dedge\My Documents\MEMVAGENDA ITEM SOUTHLAND CONSTRUCTION.docx

Attachment:

Settlement Agreement

IN THE CIRCUIT COURT, NINTH JUDICIAL
CIRCUIT, IN AND FOR ORANGE COUNTY,
FLORIDA

CASE NO.: 07-CA-5560

SOUTHLAND CONSTRUCTION, INC.,

Plaintiff,

vs.

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Defendant.

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

SEMINOLE COUNTY and PROGRESS
ENERGY,

Defendant.

SETTLEMENT AGREEMENT

1. GENERAL PROVISIONS:

- (A) The Settlement Agreement shall not be construed as an admission of liability.
- (B) The Settlement Agreement shall be kept confidential except as disclosure may be appropriate to tax and financial professionals, or as may be required by a court of competent jurisdiction. If inquiry is made by any person about this settlement agreement, the parties agree that they will state only that they have resolved their differences amicably and that any litigation has been ended.

- (C) The Settlement Agreement constitutes a final integrated settlement, superceding any prior negotiations or agreements, including discussions during mediation. Any amendments shall be in writing.
- (D) Each party shall bear its own costs and attorney's fees.
- (E) Plaintiff(s) agrees to satisfy or otherwise resolve any lien or subrogated interest for workers compensation, attorney's fees, disability or health care benefits paid or payable to plaintiff(s) as a consequence of the occurrence settled pursuant to this agreement. Defendant(s) shall bear no such responsibility.
- (F) All parties hereto that are prosecuting claims, counterclaims, ^{third-party claims} or crossclaims shall execute a complete release. ~~Claims against nonsettling parties shall remain in full force and effect.~~ Settlement is global.
- (G) Plaintiff(s) ^{and third-party plaintiff} shall execute a dismissal ~~dropping all defendants participating in this settlement with prejudice, or dismiss the case entirely, with prejudice, in the event there are no unresolved claims remaining.~~
- (H) Plaintiff(s) accepts responsibility to obtain court approval of this settlement, if required, and to seek authority to execute such other documents as necessary to consummate the terms of the settlement outlined herein. ^{Public entities' participation subject to ratification by their respective commissions at a noticed public meeting.}
- (I) The court shall retain jurisdiction ~~as to any remaining parties~~ and for enforcing the terms of this settlement.
- (J) Should the parties enter into a dispute related to this settlement, they shall submit the same to the mediator for purposes of seeking resolution through supplemental negotiations.

2. SPECIAL PROVISIONS:

A. SOUTHLAND to receive \$350,000 in full

Settlement of all claims herein. Payment
due within 45 days hereof.

(B) Contributions as follows:

1. Seminole County: \$135,000

2. Progress Energy: 75,000

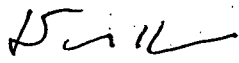
3. ATT/Bell South: 50,000

4. FDOT: 69,000

5. City of Ouedo: 21,000

Total \$350,000


(C) FDOT to release Seminole County escrow monies.

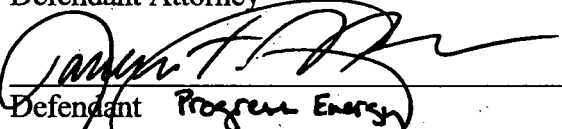
 Denny Carr
SC

Plaintiff

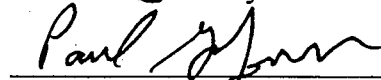

Plaintiff Attorney



Defendant Seminole County


Defendant Attorney


Defendant Progress Energy


Defendant Attorney


Defendant FDOT


Defendant Attorney

Respectfully Submitted,


John J. Upchurch, Mediator

Date

3/30/09

cc: Counsel